IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 4515 OF 1993.

Shri Rajaram Rakshe,]
Adult, Occupation : Business,]
residing at 159, Mari Peth,]
Mahabaleshwar Peth, Satara.] .. Petitioner

Versus

1. Hasan Hussein Bagwan,]
(since deceased by his heirs)]

1a) Hafija Hasan Bagwan,]
1b) Gulab Hasan Bagwan,]
1c) Shabbir Ahmad Hasan Bagwan,]
1d) Shafi Ahmad Hasan Bagwan,]
1e) Allakbar Hasan Bagwan,]
1f) Sabir Ahmad Hasan Bagwan,]
1g) Ranima Abdul Hasan Bagwan,]
Nos.1a to 1f residing at 329,]
Ghoprpadi Peth, Pune - 2.]
and 1g residing at 151, Kacheri]
Road, Baramati, District: Pune.]
2. Shabir Kasam Bagwan,]
Adult, Occ:- Service,]
residing at 329, Ghorpadi Peth,]
Pune - 2.]
3. Janabai Kasam Bagwan,]
Adult, Occ. : Household, residing]
at 329, Ghorpadi Peth, Pune - 2.]
4. Smt. Shakuntala Shivram Mahadik,]
Adult, Occupation: Household,]
residing at 229, Hari Peth,]
Mahabaleshwar.]

5. Gani Kasam Bagwan, Adult,]
Occupation : Service, residing at]
329, Ghorpadi Peth, Pune - 2.] .. Respondents
(Nos.1 to 3-Org.
Plffs-Nos.4 & 5)

Mr. P.S. Dani for the petitioner.

Respondent Nos.1a, 1g and 4 served.

CORAM: ANOOP V. MOHTA, J.

DATED: 28TH JUNE, 2005

ORAL JUDGMENT. :

1. Petitioner - original defendant No.2 (sub-tenant) has invoked the provision of Article 227 of the Constitution of India and challenged the judgment dated 23rd September, 1993, passed by the Additional District Judge, Satara, in Regular Civil Appeal No. 77 of 1989 by which the Appeal filed by the original plaintiff-landlord respondent Nos.1 to 1g, 2 and 3 herein was allowed, and which resulted into reversal of the order dated 23rd August, 1988, passed by the Civil Judge, Jr. Division, Wai, whereby the Suit of the original plaintiffs was dismissed. The present Petition is only by the petitioner-original defendant No.2.

2. The original plaintiffs filed Suit under Section 12, 13(1)(g) of the Bombay Rents, Hotel Lodging House Rates (Control) Act, 1947, (for short "The Bombay Rent Act") alleging sub-letting of the Suit premises by original defendant No.1 to defendant No.2 (petitioner). Original defendant No.3 is a co-sharer in the suit property. The learned trial Judge, after considering

the material placed on the record by the parties, including the respective evidence led by the parties, held that the defendants are not defaulters; defendant No.1 has not sub-let the premises to defendant No.2; plaintiffs failed to prove the bonafide need; greater hardship would be caused to the defendant in case of passing of decree for possession; no rent due; plaintiff is not entitled for possession of the suit premises; defendant No.2 (petitioner) is the tenant of the premises in question and he is not a defaulter and in the result, dismissed the Suit. The Appellate Court, on the Appeal filed by the original plaintiffs, however, held that original defendant No.1 sub-let the suit property to defendant No.2 i.e. the petitioner, but at the same stroke, based on the same evidence, held that the defendants are not willful defaulters and on this foundation, the Appeal was partly allowed and original defendant Nos.1 and 2 have been directed to put the original plaintiffs in vacant possession of the suit premises.

3. Heard the learned counsel Mr. P.S. Dani for the petitioner. The Writ Petition stands dismissed against respondents Nos.1b to 1f, 2, 3 and 5. Respondent Nos.1a, 1g and 4 are served. None appeared for the respondents. After going through the reasoning

given by the Court below and the evidence led by the parties, with the assistance of the learned counsel appearing for the petitioner, I am of the view that the reasoning and finding given by the learned trial Judge in Regular Civil Suit No.117 of 1980 by the judgment dated 23rd August, 1988, need to be maintained basically for the following reasons.

4. The learned Appellate Court, while answering the issue that the defendants are not the willful defaulters, held as under:

> "As such, the defendant No.2 has taken self contradictory stands. The plaintiff states in his examination before the Court, the defendant no.1 sub let the suit property to defendant no.2. In the earlier para of the pleading, the defendant no.1 admit that case. In fact, burden of proving lease was on the defendant no.2. The statement of the plaintiff, coupled with the pleadings was sufficient to prove the fact of sublease. After considering all the evidence discussed above, there is sufficient evidence on record to show that the defendant No.2 is sub-tenant of the suit property, which is strictly prohibited under the provision of Bombay Rent Act. On that ground, the plaintiffs are entitled to recover possession of the suit property from the defendant."

In the same stroke in the next paragraph, he has observed as under:

> "The plaintiffs state, the year 1976, till filing of the suit the defendant nos.1 and 2 did not paid rent of suit property to plaintiff landlord. The plaintiff No.1 state, she evicted the suit property in the year 1976 and the plaintiff put defendant no.2 in possession of the suit property. The defendant no.2 state, from the year 1976, onwards, he paid rent of suit property to defendant no.3, who is admittedly one of the co-sharer of the suit property. There are no reason to dis-believe these rent receipts. Money order of rent sent by defendant no.2 are accepted by the wife of defendant no.3 on his authorisation. Any how, one of the co-sharer of the suit property received rent of the suit property. So, in my view, the defendant no.2 is not in default and rent of suit property can not be recovered from the side of the defendant."

5. Once the reasonings are that the petitioner (original defendant) paid the rent to defendant No.3, who is admittedly one of the co-sharer of the suit property, and the learned Judge has accepted the above theory of the Money Orders, and on this admitted position itself and, as one of the co-sharer of the suit property, had received the rent without any objection from the petitioner (defendant No.2) and once it has been observed accordingly, and finding is given that the defendant No.2 i.e. the petitioner is not in default and the rent of the suit property cannot be recovered

from the said defendants, I am of the view that there is a contradictory and self destructive reasoning given by the Appellate Court by observing that original defendant No.1 sub-let the suit property to defendant No.2-petitioner illegally. The learned trial Judge has rightly considered that original plaintiff failed to prove the sub-tenancy. The burden of proof lies on the original plaintiffs to prove the case of illegal occupation. The defendants have brought on the record, sufficient evidence to prove the valid tenancy and the payment of the rent to one of the co-owner. The defendant No.3 remained exparte and plaintiffs failed to bring and prove contrary case and not even examined original defendant No.3 to disprove and rebut the petitioners' case.

6. The learned Appellate Court reversed the finding also by raising doubts about the rent receipts. The learned counsel appearing for the petitioners contended that there was no such case made out by the original plaintiffs-respondents herein, raising any doubt about the said documents. Even assuming for a moment that there are some statements made in the examination by defendant No.1 that the premises were sub-let to defendant No.2-petitioner, in the present facts and circumstances of the case, and in view of the

fact that the learned Appellate Court has held that the defendants are not willful defaulters and petitioner-defendant No.2 paid the rent regularly to defendant No.3. This is also sufficient to accept the case of petitioner-defendant No.2. The reasoning given by the learned trial Judge, therefore, is correct. The reasoning given by the Appellate Court appears to be self contradictory and unacceptable.

7. In view of this, the order dated 23rd September, 1993, passed by the Additional District Judge, Satara, in Regular Civil Appeal No.77 of 1989 is quashed and set aside. The judgment and order dated 23rd August, 1988, passed in Regular Civil Suit No.117 of 1980 is restored. In the result, the Suit of the original plaintiff is dismissed.

8. Rule is made absolute in terms of prayer clause (a) and (b). No order as to costs.

[ANOOP V. MOHTA, J.]

[srpasha@hc]